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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORPORATION, BETHLEHEM STEEL COMPANY, and KAISER STEEL CORPORATION,

Respondents.

Brief of Respondent Kaiser Steel Corporation In Opposition to Petition for a Writ of Certiorari

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I.

QUESTIONS PRESENTED

1. Were the District Court and the Court of Appeals correct in holding that Petitioner failed to prove a *prima facie* case under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2)?

2. Did the District Court commit prejudicial error in its rulings on certain evidentiary and procedural points raised by Petitioner?

II.

STATEMENT OF THE CASE

A. Petitioner's business.

The case is well summarized in the opinion of the Court of Appeals (Petition, App. A, pp. 2-10, 12-17), but a more detailed statement is here desirable directed toward the questions now presented in the Petition, including certain special facts relating to Respondent Kaiser Steel Corporation (hereinafter referred to as "Kaiser").

This case arose out of the steel shortage that existed throughout the United States in the latter part of 1955. Petitioner's chief complaint against Respondents is that each of them, allegedly acting in concert as conspirators, failed to furnish Petitioner during such shortage with all of the steel it wanted at the times desired.

Petitioner is a structural steel fabricator with a plant located in the city of Oakland, in the San Francisco Bay Area of Northern California. Petitioner began business in 1924 with an investment of $250 (R. 1351-1352, 2385) and, without additional capital investment, it had grown, by 1955, into a company with plant and equipment that its president estimated was worth $4,000,000 (R. 2487). As a structural fabricator, Petitioner fabricates and erects the structural steel framework for buildings, bridges, highway overpasses and other structures.

Although Respondents are primarily steel producers, each of them is also engaged in structural fabricating (R. 2673-2675). Respondent United States Steel Corporation (hereinafter referred to as "U. S. Steel") has been a structural fabricator as well as a steel producer since the company was organized in 1901, and has had structural fabricating plants on the West Coast since 1948, see *United States*

v. Columbia Steel Co., 334 U.S. 495 (1948). Respondent Bethlehem Steel Company (hereinafter referred to, along with Bethlehem Pacific Coast Steel Corporation, collectively, as "Bethlehem") has been in the structural fabricating business for approximately 45 years and has had plants on the West Coast for about 30 years (R. 2401). Kaiser commenced structural steel fabricating in February, 1955—*less than ten months before this suit was brought*—when it acquired fabricating facilities in the city of Montebello, south and east of Los Angeles, California (R. 1606).

Structural fabricating is a highly competitive business with numerous aggressive concerns seeking work. Over 18 independently owned companies compete with Petitioner in the San Francisco Bay Area alone (R. 2401-2404). The number of steel fabricators in California has more than doubled since 1939 and has increased over 60% since 1947 (Ex. U-32, R. 2715, 4078). Over the years, independent fabricating companies nationally have occupied an increasingly large share of the market (Ex. U-31; R. 2713, 4077).

The principal steel products used by Petitioner and other structural fabricators are structural shapes, plates and wide flange beams. Since World War II, Petitioner has bought most of its steel from the various Respondents, purchasing substantial quantities of wide flange from Bethlehem, and substantial quantities of plate and structural shapes, from U. S. Steel and Kaiser (Ex. F-2, R. 1952, 4056-4062). Petitioner, of course, seeks to buy from the cheapest source (R. 1999-2000).

Each Respondent sells most of its structural steel to trade customers, including fabricators such as Petitioner, but also furnishes structural steel to its own fabricating plants (R. 2533, 3999, Ex. B-68, R. 3167, 4023).

B. Kaiser's position in the steel industry and its product limitations.

Kaiser was a "war baby", blowing in its first blast furnace in December, 1942 (R. 1602, 1604-1605). Following the end of the war, it went through four expansion programs. In 1955 the annual capacity of its only mill, that at Fontana (approximately 60 miles east of Los Angeles), was 1,500,000 tons of steel ingots (R. 1602). While that figure may seem large, as Petitioner's counsel said in his opening statement, it resulted in Kaiser producing less than 2% of the national steel output, which he contrasted with 30% by U. S. Steel and 15% by Bethlehem (R. 1311-1312). Because Kaiser is a relatively new and small company, there are very substantial limitations on the nature and extent of Petitioner's possible proof against Kaiser.

Petitioner's case relates to but one of the many phases of the steel industry, namely, fabricated structural steel used by the construction industry. That phase involves no more than 10-15% of the total national steel output (R. 1311). Within that phase of the over-all steel industry, Petitioner's case focuses on the difficulty which it encountered in 1955 in obtaining sufficient quantities of particular products, namely, (1) wide flange beams, (2) large structural shapes rolled by the Eastern mills, particularly Z bars for railroad car underframes, and (3) plates.

(1) *Wide flange beams* have flanges running up to 36 inches in width, appear H-shaped in cross section, and are used for beams and columns in heavy structures such as large buildings and bridges (R. 1360). Special equipment is required to roll wide flange beams (*ibid.*). Petitioner asserts that "the mills in the western part of the United States cannot roll wide flange material. . . ." (Petition 6). Petitioner

concedes that Kaiser was "not much of a factor" in the wide flange market (R. 1312, 880), and identifies Bethlehem as the source of wide flange material on the West Coast (Petition 5-6), and Petitioner's normal supplier of such material (R. 1716). The reason why Kaiser's participation in the wide flange market was *de minimis* is simple: *having no wide flange mill*, it improvised by rolling, on its structural mill, a section which, although slightly different, qualified as wide flange. Kaiser was able to roll this special section in the small 8-10 inch sizes only (R. 2149, 1603). The construction of a wide flange mill on the West Coast is not economically feasible; even if one steel mill had the entire West Coast market for wide flange, that quantity would be insufficient for economical operation (R. 3132-3133). The small special sections which Kaiser produced covered a very minor percentage of the wide flange requirements of Petitioner (R. 2150). *This evidence eliminates Kaiser from the wide flange picture.*

(2) With respect to *Z bars*, a product discussed at great length in the Petition, *Kaiser drops out of the picture completely.* The reason is simple: Kaiser cannot produce Z bars for lack of the required equipment (R. 2149).

(3) *Plate* (flat rolled steel pieces differentiated from steel sheet by thickness) is the one product involved in this action which was produced by Kaiser to any significant extent. Even as to plate, Kaiser's mill limitations and product ranges imposed severe restrictions on its ability to meet Petitioner's needs. For example, Petitioner's Fourth and Main and Salinas River Bridge jobs together required 1,275 tons of plate (R. 1766, 1772), of which only a total of 180 tons fell within Kaiser's mill limits *and Kaiser accepted and furnished that tonnage* (R. 2176-2177).

C. Petitioner stipulated that it had no claims whatever against Kaiser prior to February 1, 1955 and did not offer its pre-1955 evidence against Kaiser for any purpose.

Kaiser did not enter the *structural steel fabricating business* until February 1, 1955, when it acquired the Montebello, California, plant of Union Steel Company, located south and east of Los Angeles (R. 1606).

From the beginning to the end of the case, Petitioner made it clear that its only claim against Kaiser related to 1955 (R. 860 (pretrial); R. 1202 (trial)). Petitioner's counsel stipulated that:

> ". . . up to February 1, 1955, Kaiser Steel Corporation met the requirements of Independent Iron Works as Independent Iron Works called on them to do so, in quantity, in time, and also *was a good, adequate and prompt supplier*" (R. 1957; the emphasis has been added throughout the Brief, unless otherwise indicated.)

Petitioner's counsel agreed that the jury should be instructed that Kaiser was not bound by pre-1955 evidence, and that it was not offered as to Kaiser in any way (R. 1888-1889). The court instructed the jury as follows:

> ". . . Ladies and gentlemen, counsel have stipulated; that is, Mr. Johnson and Mr. Hilldebrand—Mr. Johnson on behalf of the defendant Kaiser Steel Company—that Kaiser up to the year 1955 supplied steel upon order on all occasions at the request of Independent Iron Works, was a good supplier, and filled orders as they were filed satisfactorily in all ways, and that their complaint with Kaiser is subsequent to January 1, 1955." (R. 1958)

The stipulation and instruction were applied and confirmed in a number of specific instances during the trial (R.

1899, 1913-1914, 2429, 2810-2811), making clear beyond any question that no evidence of an alleged conspiracy existing prior to 1955 related in any way to Kaiser, and that Petitioner had no complaints of any kind against Kaiser prior to February 1, 1955.

D. The Montebello Fabricating Division of Kaiser was not a competitor of Petitioner during 1955.

The record shows that Kaiser's Montebello Fabricating plant bid against, or in competition with, Petitioner on *2 jobs out of the 835* jobs bid by Petitioner in 1955 (R. 2442). Furthermore, on those two jobs—the Salinas River Bridge job and the Union Oil Office Building jobs—*Petitioner* was the low bidder and was awarded the contracts. There was no substantial evidence of competition between Kaiser's Montebello Fabricating plant and that of Petitioner located over 425 miles away.

E. The structural steel shortage of 1955.

Demand for structural steel has fluctuated over the years, depending largely on the volume of work being done by the construction industry. Since World War II there have been several periods during which demand for steel outran the productive ability of the mills, despite the continuous growth in mill capacity (R. 2528-2533).

The steel shortage which led to the filing of this lawsuit developed in mid-1955. In 1954, steel mill operations dropped to 71% of capacity (Ex. B-52, R. 3060, 4012). In 1955 there was a record increase in bookings for fabricated structural steel work (Ex. B-50, R. 3054, 4010-4011), as another building boom got under way. In that year, the structural fabricating industry booked 4,651,312 tons of new work, an increase of 47% over 1954, and an all-time high tonnage (Ex. B-50, *supra*; Ex. B-51, R. 3058, 4011).

After months of not being able to get enough orders to operate their steel mills at capacity, each Respondent was met with a flood of orders for structural steel beginning in the second quarter of 1955. By the fourth quarter, the industry was operating at over 98% of capacity (Ex. B-52, *supra*; Ex. B-53, R. 3061, 4012-4013). Bethlehem's mills even exceeded 100% of the rated capacity in the last three months of the year (Ex. B-54, R. 3069, 4043; Ex. B-55, R. 3071, 4014).

The inevitable result of this sudden and overwhelming demand was that Respondents could not immediately accept all the orders that were tendered to them. Each Respondent had to adopt some method of dividing the steel it produced among its customers so that all would have a share, until such time as supply came into balance with demand. Respondents met this problem in varying ways. As Petitioner's purchasing agent testified (R. 1419):

> "Well, let me state at this time that 1955 was a very confusing year insofar as allocations, *and various mills operated differently.*"

Each Respondent continued to supply steel to its own structural fabricating facilities. But such fabricating facilities, just like trade customers, could not buy all the steel they wanted and had to restrict the amount of new business on which they bid (R. 2716, 3239, 3273, 3292-3294, 3299-3302, 3308).

Meanwhile, Petitioner bid on jobs without reference to industry supply-demand conditions (R. 2419, 2422-2424, 3399). Petitioner bid or quoted on 174,041 tons of work in 1955, of which it secured contracts for 19,733 tons (R. 2412, 2417)—a larger percentage of successful bids than Petitioner's

president testified he would normally expect to get (R. 2413). The 19,733 tons booked in 1955 was a record high for Petitioner (R. 2416-2417). The larger tonnage jobs were bid and secured by Petitioner in the latter part of 1955 (R. 1965-1966) after, and with the knowledge that, the steel shortage had become acute (R. 2145, 2169), apparently with the expectation that Petitioner's lawyers would get the steel (R. 2422).

By late 1955 Petitioner had a record backlog of work on its books and knew that there would be difficulty obtaining early delivery of steel except at the expense of some other fabricator. Petitioner thus had painted itself into a corner.

Petitioner presented a rash of duplicate orders to each Respondent for early delivery of large quantities of steel. Many of the orders were accepted as the various Respondents tried to accommodate Petitioner's requests. Other orders simply could not be filed for early delivery. In its eagerness to book more work, despite the increasing steel shortage, Petitioner in October 1955 bid and obtained a contract to manufacture underframes for Southern Pacific Company—*the largest contract on Petitioner's books*—(at 10% below Petitioner's estimated cost) (R. 3398-3399). Petitioner took the extraordinary step of resubmitting to all three Respondents *by registered mail* a number of orders calling for production and delivery dates on various jobs which it knew in advance were impossible of performance and would be rejected (R. 2009-2010, 2228-2229; e.g. Ex. 84, R. 1861, 3962-3963). Thereupon, on November 28, 1955, Petitioner filed the present action seeking damages and an injunction compelling Respondents to supply more steel (R. 40).

III.

NO ADEQUATE GROUNDS FOR GRANTING THE WRIT HAVE BEEN CLAIMED

The Petition is a repetition of arguments and contentions made by Petitioner during the eight years of this litigation. In only one section of the Petition (pp. 16-17) is even superficial recognition given to the fact that (Petitioner already having had a fair trial and an impartial and exhaustive review on appeal) some *reason or ground* must be shown, within the well-recognized limits of Rule 19 (Supreme Court of the United States Revised Rules, 28 U.S.C.A.), to justify the United States Supreme Court in exercising its discretionary powers in granting the writ of certiorari. The four reasons stated in the Petition lack substance.

The alleged first reason relates to Section 10 of the Clayton Act, the third cause of action of the amended complaint, and the carframes, none of which matters are considered in this Brief since they do not apply to Kaiser.

The second alleged reason is claimed prejudicial error in the District Court's ruling, during the discovery phase of the case, excluding the deposition of Dr. Kreps, a matter which will be discussed later in this brief (Section IV D (1)). Assuming, for purposes of argument, that the United States Supreme Court might have had an interest in the *general question* as to appropriate limits to be placed upon the admission of expert economic testimony in anti-trust cases, the Court of Appeals has resolved this general question *in Petitioner's favor*. The questions as to whether Petitioner was actually foreclosed from offering expert testimony on economic theories at the trial of this case, and, if so, whether this was a prejudicial error, were thoroughly reviewed by the Court of Appeals and decided in favor of

Respondents. Surely the correctness of these rulings have no special or general significance and are not cause for the United States Supreme Court granting certiorari (Rule 19).

The third alleged reason for granting the Petition is that the District Court committed error in ruling that Petitioner had not made out a *prima facie* case, and the Court of Appeals, in affirming, has created a *conflict* with decisions of the United States Supreme Court. Petitioner's allegation completely ignores the express recognition by the courts below of the correct rule of law to be applied to the facts. Judge Wollenberg's opinion stated:

> "On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence." (App. B to Petition, p. vi; a similar statement is made at the top of p. viii.)

Similarly, the Court of Appeals recognized that a motion for a directed verdict should be denied, unless the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding (Petition, App. A, p. 5). Thus, the Petitioner has had the benefit of an appeal and a thorough review of the action of the trial court by the Court of Appeals, which stated and applied the correct controlling legal principle. In this posture of the case, it may not fairly be said that the decision of the Court of Appeals *conflicts* (within the meaning of Rule 19 (b) of the Supreme Court Rules) with the United States Supreme Court cases cited by Petitioner.

Petitioner's fourth and last claimed reason is an alleged *conflict* between the decision of the Court of Appeals and the United States Supreme Court's decision in *Continental Ore Co. v. Union Carbide Co.*, 370 U.S. 690 (1962), which requires a "look at the conspiracy as a whole" (Petition

17). But, as is the case with the third alleged reason, *supra*, both the Court of Appeals and the United States District Court specifically recognized and applied the correct rule of law. Judge Wollenberg's opinion stated:

> "In reviewing separately the evidence relating to each of plaintiff's contentions, the court has not overlooked giving consideration to them in their entirety. The record as a whole has been reviewed and *whether plaintiff's charges are taken singly or collectively*, the conclusion is inescapable that no logical or reasonable inference of conspiracy between the defendants could be drawn." (Petition, App. B, pp. xv-xvi)

The Court of Appeals opinion not only applied the correct rule of law, *but cited and quoted the very case* with which Petitioner claims the conflict, as follows:

> "Parenthetically we deem it appropriate at this point to observe that, although we have set out and discussed *seriatim* the various business practices which plaintiff contends the defendants commonly followed, nevertheless *we have, in fact, considered them collectively* and our conclusion reflects a faithful adherence to the recent admonition of the Supreme Court that 'in cases such as this, *plaintiff should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.' Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)." (Petition, App. A, p. 5)

Thus, there is no *conflict* between the decisions of the Court of Appeals and the Supreme Court, within the meaning of Rule 19 (b); there is simply a conflict between Petitioner's unfounded, ill-starred hopes and the evidence in the case.

IV.

ARGUMENT

A. Kaiser's division of its limited supply of steel plate among its customers does not support an inference of conspiracy with other Respondents.

However variously phrased in the numerous and voluminous pleadings and oral presentations made by Petitioner over the years in the course of this protracted litigation, the only significant contention which it has made as to Kaiser is (a) that this Respondent, in the latter part of 1955, refused to accept all of Petitioner's orders for steel plate; (b) that in so doing (it is alleged) Kaiser consciously adopted a course of conduct parallel to that of the other Respondents; and (c) that this allegedly conscious and parallel conduct will support a reasonable inference that Kaiser conspired with the other Respondents to allocate steel (and possibly to monopolize the steel fabricating business). Contrary to the foregoing contention, *Petitioner's evidence* established that Kaiser, acting independently and in a manner different from that of the other Respondents, met Petitioner's requirements fairly, equitably and to the best of Kaiser's ability within its mill and product limits and subject to its own production problems. Because Petitioner's case is admittedly dependent solely upon hoped-for inferences, as distinguished from direct proof, (Petition, App. A, p. 5), we think it worthwhile to review Kaiser's steel supply record.

1. First Quarter 1955.

Petitioner's purchasing agent, Andersen, admitted that: (a) In the last quarter of 1954 and the first quarter of 1955 Kaiser's salesmen contacted him regularly and offered unlimited supplies of steel within the mill limits of Kaiser for early delivery. (R. 2163-2164); (b) During the fourth

quarter of 1954 Petitioner purchased *no steel* from Kaiser; (c) During the entire first quarter of 1955 Petitioner purchased only about *80 tons* from Kaiser (R. 2165); and (d) No failure on Kaiser's part to accept orders from Petitioner was claimed up to April 1, 1955.

2. Second Quarter 1955.

In mid-February, 1955, Kaiser told Andersen that the steel market was tightening up very rapidly, and that Kaiser was booked up on plate through June (R. 2168-2169, 2195, 2265).

In April Petitioner submitted its requirements on the Fourth and Main job involving 425 tons of plate (Ex. K-8, R. 2173, 4026-4027), and the Salinas River Bridge job involving 850 tons of plate (Ex. 23, R. 1776). Kaiser responded promptly and accepted for *August* production all the tonnage of plate on the two jobs that was within Kaiser's mill limits. The thanks that Kaiser received was the first registered letter or "suit order" (R. 2233) of May 17 calling for *June* rolling (R. 2181-2182, Ex. K-9, R. 2188-2189). After a written explanation of the production situation by Kaiser and a personal conference (R. 2192-2195), new purchase orders for both of those jobs, and an additional job, were prepared and accepted by Kaiser for August rolling (R. 2195; Ex. K-20, R. 2262, 4031-4032).

Thus, admittedly, as of June 30, 1955, there were no orders which had not been taken care of by Kaiser (R. 2209-2215).

3. Third and Fourth Quarters 1955.

Andersen testified that by mid-July he knew that the demand for steel was continuing to increase; that the predictions of both industry and government for the last half

of the year were that the demand was going to be greater than it had been in the first half; and that the demand for plate and wide flange steel would be particularly heavy (R. 2216). Confirming what Andersen knew about the critical and worsening general structural steel supply situation, on July 22d Kaiser told Andersen that Kaiser had run into trouble in keeping up on its plate orders, and that it would have to block out October in order to catch up (R. 2217). On August 4th Kaiser advised that it was booked up full on plate through November (R. 2223).

On two of the four jobs on which Petitioner contacted Kaiser from July 1st to November 28th, Petitioner, without explanation or cause, delayed six weeks after being awarded the jobs before requesting steel from Kaiser (R. 2220, 2225). Kaiser replied on August 10th with respect to the Fresno Bridge job that, as it had already advised Petitioner, "its plate schedules are completely filled through the month of November" (R. 2223). Thereafter that job disappears from the evidence; presumably Petitioner satisfied its requirements from other sources.

On the large Tulare County Court House job only a small part of the steel was plate, 133 tons (R. 1729), and Petitioner's tardy request of August 30th to Kaiser was limited to this tonnage (R. 2227). Kaiser was forced to advise the next day that it was booked full through November (Ex. 77; R. 1735, 2225-2226).

At this point in the chronology, Kaiser's mill operations came to a halt. A *wildcat strike* broke out on September 26th and shut the mill down through October 12th (R. 2228, 2234). Since a steel strike causes lost time in addition to actual days in which the mill is shut down (R. 1925-1927), the impact of this strike on Kaiser's ability to serve Petitioner or anyone else was far-reaching (R. 2240).

Following termination of the strike (and more "suit orders"), Kaiser advised Andersen and Petitioner's President, in a mid-November meeting, of the delays resulting from the strike and their effect on pending bookings, namely, that Kaiser was required to devote January to filling the orders which had been delayed during the strike. Kaiser offered to fit in 235 tons of plate for Petitioner in February. Petitioner accepted this offer and included in its purchase orders the plate for the Tulare County Court House job (R. 2237-2238).

On the Union Oil Building job Petitioner, on October 28th, submitted a general listing of the types and tonnages of steel required, amounting to 2,959 tons, only 103 tons being plate (R. 2249). On November 1st Kaiser advised Petitioner of the obvious fact that such a general list was of no help to Kaiser and could not serve as a basis for an order, and then requested that Petitioner submit the usual detailed bill of materials (R. 2250). As of the time suit was filed, Petitioner had failed to do this (R. 2253).

On the fourth and final job, Petitioner's Southern Pacific carframe job, which is given so much stress, Kaiser gave "job protection" (a practice not used by either of the other Respondents) to Petitioner and other bidders on the 18-inch ship-channel. This means that Kaiser agreed in advance of the bidding that it would furnish the steel to the successful bidder (R. 2452; for another instance of Kaiser job protection see R. 2455-2465) and, in fact, it accepted Petitioner's order in October, 1955 for 1,072 tons of steel for rolling commencing in January 1956 (R. 2240).

This is the record to November 28, 1955, when Petitioner filed suit, and there is no evidence proving anything against Kaiser.

4. U. S. Steel and Bethlehem.

The course of action followed by U. S. Steel and Bethlehem in the face of the steel shortage which developed in 1955 is summarized in the opinion of the Court of Appeals (Petition, App. A, p. 5-7), and may perhaps be more fully developed in the briefs of these Respondents. Suffice it to say that the methods of these Respondents in filling their customers' orders were not the same as, or in any way parallel to, Kaiser's.

5. Summary as to Kaiser's acceptance of Petitioner's orders in 1955.

When Petitioner's evidence relating to Kaiser from February 1st to November 28th, 1955, is analyzed, a number of over-all conclusions, each fatal to Petitioner's claims, are readily apparent:

a. Kaiser's commitments as to the quantities of steel which it would furnish to Petitioner and as to the rolling dates therefor were measured and determined solely by Kaiser's own internal production and scheduling problems.

b. Within the restrictions of its mill limits and subject to its rolling schedules and existing commitments, Kaiser accepted Petitioner's orders.

c. There is no evidence that the treatment extended to Petitioner by Kaiser was less favorable than that extended to any other customer. (In fact Petitioner has never even claimed any such less favorable treatment)

d. Most important of all, there is absolutely no evidence that Kaiser's handling and treatment of Petitioner's orders in the year 1955 was related to the conduct or activities of either of the other Respondents, to any conspiracy, or to any factors other than Kaiser's own production and steel supply problems.

B. Petitioner's collateral conspiracy contentions were completely without merit.

1. Vertical integration, which Petitioner admits is not *per se* illegal (Petition, p. 12), by Kaiser in February 1955 is not shown to have had any effect whatsoever on any act or policy of Kaiser. All of Kaiser's activities prior to February 1, 1955, received Petitioner's blessing, and there is no evidence of any change, after Kaiser entered the structural steel fabricating business.

2. Petitioner asserts (but never proves) that in 1955 there was a conspiracy between U. S. Steel and Bethlehem, and that it may be inferred that Kaiser joined it solely because of the following:

a. Kaiser entered the structural steel fabricating business (true);

b. Kaiser thereafter increased the amount of steel that it supplied to its Montebello plant in comparison with what it had sold to the former owners, Union Steel Company, allegedly constituting favoritism (false);

c. U. S. Steel and Bethlehem "favored" their structural fabricating plants (false);

d. Thus, Kaiser consciously engaged in parallel conduct with that of the other Respondents (false).

The opinion of the Court of Appeals demolishes the above argument with its findings that *none* of the Respondents favored their fabricating plants. The Court of Appeals further expresses its doubts as to whether an inference of conspiracy could be drawn from such normal business conduct as favoring one's own plants (Petition, Ex. A, p. 9). *Dipson Theaters, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (2d Cir., 1951), *cert. denied*, 342 U.S. 926 (1952).

As to Kaiser, there were facts which could not be overlooked by the courts below, and compelled the finding that Kaiser had not favored its Montebello plant, including:

(i) Lack of competition between Montebello and Petitioner;

(ii) Late entry of Kaiser into structural steel fabricating;

(iii) U. S. Steel, a major supplier of Union Steel Company, dried up as a source of steel after the acquisition by Kaiser (Ex. 457C; R. 3497, 3999, 1581-1582);

(iv) Kaiser supplied less plate to its fabricating divisions (Montebello and two plants not engaged in structural fabricating) in 1955 than it had in 1954 (footnote to Ex. 458, R. 3498, R. 4001-4002; Ex. 462, R. 3502, 4002-4003). Actually, in 1954, a year in which Kaiser had Petitioner's blessing, it shipped three times as much plate to its fabricating divisions as it did in 1955 (*ibid.*);

(v) Montebello had a capacity of 48,000-60,000 tons a year (R. 2946), in comparison with which the shipments of plate, wide flange and structural shapes from all sources to Montebello in 1955, totaling 11,681 tons, appear quite modest (Ex. 457-C, supra);

(vi) Having in mind that Kaiser contributed 1,500,000 tons of steel to the western steel market per year (R. 1602), the shipment of 1,772 tons of plate to its Montebello plant in 1955 can give rise to no inference against Kaiser. (Kaiser had furnished larger quantities to the predecessor Union Steel Company in earlier years (Ex. 462, *supra*).

3. The spurious price uniformity argument of Petitioner is sufficiently answered by the Court of Appeals opinion (Petition, App. A, pp. 12-13).

4. The allegations of trading off of steel as to Kaiser are absurd. Kaiser was in exactly the same position as Petitioner regarding wide flange, Z bars and heavy plate—it had to rely on Bethlehem and U. S. Steel since it did not make the products. There is not the slightest evidence that the

purchase from Kaiser by Bethlehem and U. S. Steel of certain products (none of which are at issue in this case), which these Respondents did not make on the West Coast, was in any way related to Kaiser's purchases of lesser amounts of steel which it did not manufacture, or that there was any agreement or procedure for a "trade". The direct and uncontradicted testimony is that there was no such agreement or procedure (R. 1619).

5. Petitioner's wild dream that conspiracy should be inferred from "non-competition" of the Respondents, in the sense that they are not all engaged in each identical line of business on the West Coast, emphasizes the appalling weakness of Petitioner's case. Kaiser having undertaken four major expansion programs since its start in 1942 (R. 1602) can hardly be criticized, let alone said to conspire, because it has not yet been able to engage in every aspect of the steel business.

C. There was no proof of a monopoly nor an attempt to monopolize.

The loose charges of conspiracy to monopolize alleged in the complaint have never been substantial in this litigation. No attempt to prove a case of monopoly or attempt to monopolize was made; intent to monopolize was not shown, nor the size of the market, the participants therein, the market shares of the Respondents, or any evidence of any increase in shares, or a dangerous probability that monopoly would be accomplished. Petitioner has apparently abandoned its vague charge of conspiracy to monopolize, but in any event the conspiracy charges have already been disposed of in Section IV A and B. Further, the Petition makes no claim that Kaiser has a monopoly or has made an indi-

vidual attempt to monopolize (Petition, pp. 23-26). It would be an imposition on the Court to do so.

Petitioner, from the beginning, built its alleged conspiracy case by naming a group of the principal producers and then simply asserting that *they* (collectively) had a monopoly. To the extent that the producers manufactured similar products, this was alleged to be the result of a conspiracy to monopolize; to the extent that the producers made different products or acted differently, this was alleged to be a result of a conspiracy to restrain by dividing the market—"non competition". There was admittedly no direct evidence of a conspiracy to monopolize (Petition, App. A, p. 5), and the Court of Appeals properly and completely rejected all of Petitioner's monopoly charges (Petition, App. A, pp. 15-17).

D. Petitioner's remaining arguments have no merit.

Petitioner advances eleven numbered Arguments. Argument No. 1 relates to Section 10, the third cause of action, and Respondent U. S. Steel, and requires no response by Kaiser. Argument No. 2 on monopoly has already been answered in Section C, *supra*. Argument No. 5 relates to an alleged conspiracy among the Bethlehem companies, and requires no answer by Kaiser. Argument No. 6, relating to the admissibility of evidence prior to January 1, 1955, has no application to Kaiser because Petitioner claims no wrongful conduct as to Kaiser in such period (see Section II C). Argument No. 8, alleging error in compartmentalizing the testimony, has already been answered in Section III, *supra*. Argument No. 11 on the subject of inferences has, to the extent any answer is required, already been dealt with in Section III, *supra*. Petitioner's five remaining arguments will be given the summary treatment which they merit.

1. **Argument No. 3.**

Argument No. 3 alleges error concerning the deposition of Dr. Kreps. As already pointed out, the Court of Appeals has decided the legal question as to the general admissibility of expert testimony in an anti-trust case in favor of the Petitioner (thus eliminating any conceivable basis for granting a writ of certiorari). Further, as held by the Court of Appeals, any error that may have been committed was not prejudicial to Petitioner's case for the following reasons:

(a) At the time that the matter was presented to Judge Murphy, to whom the case had been assigned for pretrial and who died prior to the commencement of the trial, Petitioner had completed its direct examination of Dr. Kreps on deposition. The question before the Respondents was whether they were required to cross-examine Dr. Kreps on deposition, or thereafter be barred. The effect of Judge Murphy's ruling was to relieve Respondents of the obligation to cross-examine, and to indicate that discovery, at that stage of the proceeding, on an abstract economic theory was not appropriate. This was the only significance of Judge Murphy's order.

(b) Judge Murphy's order specifically recognized that if experts were needed during the trial the court might call them of its own motion. Petitioner never requested that the court call expert witnesses (and never offered the Kreps deposition, in whole or in part). Thus, it cannot complain.

(c) Petitioner's economic theories in this case, were thoroughly understood by everyone at all stages of the proceeding, since Petitioner's counsel, (R. 881-884, 900, 903, 917-918, 1032, 1036) and Petitioner's President (R. 2413, 2422) reiterated them *ad nauseam*. Thus Dr. Kreps' deposition, if admitted, could have added nothing to Petitioner's

case. Petitioner's counsel admitted that "*the economist* [Dr. Kreps] *merely described what anybody knows . . .*" (R. 1044).

2. Argument No. 4.

Argument No. 4 starts with an extended quotation from the Restatement of Torts on refusal to deal for purposes of monopoly and concerted refusal to deal and then follows with a number of boycott cases, in an apparent attempt to confuse the Court into thinking that Petitioner was boycotted. The fact is that there was no boycott of Petitioner by Kaiser or any Respondent and no refusal to deal. Petitioner's complaint is simply that it was unable to buy all of the steel that it wanted at a time when there was an intense steel shortage, and production, whether viewed nationally or in terms of individual Respondents, was unable to keep up with demand. There is not a shred of evidence that Petitioner did not get all of the steel that it wanted and needed for every job that it bid on and was awarded during 1955. The trouble was that Petitioner wanted *delivery* at times when Respondents, individually, were unable to physically roll and deliver the steel and/or supply Petitioner without giving Petitioner priority over other equally deserving customers. Thus, Petitioner had to wait for some of the steel.

As to the law, suffice it to say that the Court of Appeals applied the correct rule for a case such as this, where it is urged that an inference of conspiracy should be drawn from allegedly consciously parallel conduct. The Petition does not claim that the Court of Appeals misunderstood the term "refusal to deal" and Argument No. 4 is substantially irrelevant.

3. Arguments Nos. 7 and 9.

These Arguments, alleging error in the failure of the District Court to admit evidence of certain post-complaint acts and in the refusal of such court to allow the filing of a tardy amended and supplemental complaint offered on the eve of trial, are fully answered in the opinion of the Court of Appeals (Petition, App. A, pp. 26-28).

4. Argument No. 10.

Argument No. 10 on taxation of costs is not so much an argument as it is a complaint. Petitioner has abandoned its claim that Respondents' cost bill was untimely filed, this being Petitioner's principal point on appeal. With respect to Petitioner's secondary claim that the trial court erred in exercising its discretion in allowing certain costs, the Court of Appeals devoted four pages of its opinion (Petition, App. A, pp. 30-34) to this subject, and disposed of Petitioner's argument so conclusively as to eliminate any need for further comment by Kaiser.

V.

CONCLUSION

Petitioner continues to the end its eight-year-old course of wild unsupported factual and legal accusations. Petitioner has had its day in court, its case was carefully tried and meticulously reviewed by the Court of Appeals. Petitioner can make no claim of hasty or lightly taken action. It was given every opportunity during extended discovery, comprehensive pretrial, a month of trial, and the appeal to prove its case. It failed utterly to do so.

Petitioner commenced this lawsuit because it wanted to get more than its fair share of steel during periods of shortage, and, in effect, wanted to have unlimited amounts of

steel regardless of its effect upon others. Petitioner's failure to prove a case in the trial court was not affected in the slightest by the hazards, uncertainties, and vexations of litigation, or by any of the multitude of evidentiary rulings and other factors that go to make up the record in a protracted case. The fact is that Petitioner never had a case.

It is respectfully submitted that the Petition for Certiorari should be denied.

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